STATEMENT OF MICHAEL R. PERRY, ESQ.

ON BEHALF OF

THE DEFENSE RESEARCH INSTITUTE

AND

THE ARIZONA ASSOCIATION OF DEFENSE COUNSEL

IN RE:

S.625 THE AUTO CHOICE REFORM ACT

Good morning, Mr. Chairman. My name is Michael Perry. I am an attorney in Phoenix Arizona. I am a member of the Board of Directors of the Arizona Association of Defense Counsel and a member of the Defense Research Institute. Both of those groups are associations of lawyers who represent defendants in civil lawsuits.

There is no question that in many jurisdictions, automobile insurance costs are too high. Defense lawyers agree that states' auto accident reparations systems should be reformed, but strongly believe that the basic principles of the civil justice system are sound. Rather than imposing a federal system of no-fault auto insurance, we urge that each state be permitted to continue to experiment with methods of reducing litigation costs. My home state of Arizona has been in the forefront of such experimentation. I'd like to talk about what has been done in Arizona and other states to reduce costs and delays in the litigation process and to reward responsible drivers.

Discovery Reform.

A recent study by the Federal Judicial Center found that half of all litigation costs are attributable to discovery, the process of fact-finding in civil lawsuits. [1] Arizona has taken the lead in trying to reduce these costs. In 1990, the Arizona Supreme Court and the Arizona State Bar created a commission to redraft our discovery rules. New rules went into effect in 1992. These rules limit the amount of discovery that attorneys may initiate on their own. They also introduced the concept of "mandatory disclosure," by which parties to a lawsuit are required to disclose certain core information about the case without prompting. Arizona's rules became a model for the federal system-- the federal courts have been experimenting with mandatory disclosure for about five years, and the federal Judicial Conference is currently considering limitations on attorney-initiated discovery. Also, several state court systems have followed Arizona's lead.

I'll be candid in saying that these discovery reforms are controversial. Attorneys are divided on whether these sweeping reforms protect their clients' interests. And the empirical studies are not unanimous in concluding that the reforms save a significant amount of money. But Arizona's experience with discovery reform demonstrates that the states' judiciaries and bars are willing to attempt radical changes to reduce the costs of the civil justice system. Moreover, as time goes by, we learn more and more about which methods work. I am confident that as state experiments continue, bolstered by the knowledge gained by experiments in the federal system under the Civil Justice Reform

[1] Federal Judicial Center, "Discovery and Disclosure Practice, Problems, and Proposals for Change," August 22, 1997.

Act, discovery costs in automobile litigation will drop in every American jurisdiction.

Alternative Dispute Resolution.

Arizona has also been a leader in alternative dispute resolution. In Arizona, as in many other states, most motor vehicle accident cases are submitted to mandatory court-annexed arbitration. Arbitration hearings are expedited proceedings in which parties present their cases informally, without the need to bring in every witness. Where Arizona differs from most states is that our ADR program has teeth. If a party rejects an arbitration award and then fails to obtain a more favorable outcome at trial, that party must pay the opponent's attorneys fees and expert witness fees in addition to court costs.

This rule creates an incentive for litigants to accept the arbitration outcome, cutting off the litigation process at an early stage and reducing expenses. Like discovery reform, it also creates a disincentive for plaintiffs to bring non-meritorious lawsuits because the "nuisance value" of the lawsuit is reduced when litigation expense is reduced. A defendant who knows he can head off a frivolous lawsuit at the arbitration hearing need not pay off a plaintiff to get rid of the case at an early stage.

Again, I must be candid in acknowledging that there is a dearth of empirical research into whether attorney fee shifting reduces litigation. Many of my colleagues in the defense bar fear that fee shifting would not be applied even-handedly-- that judges would shrink from enforcing sanctions on individual plaintiffs while enforcing them stringently against wealthy corporations. In my experience, this has not occurred in Arizona. My main point is that, as long as states are free to apply these techniques to auto accident litigation,

knowledge as to what works will emerge, and other states will then be able to adopt them.

Summary Jury Trials.

Another Arizona innovation is the summary jury trial. The idea of the summary jury trial has been around for some time in the federal court system. It has been used as an ADR method to get a jury's non-binding, advisory verdict to guide the parties to settlement. Arizona's twist on the summary jury trial has been to make it binding. The parties must voluntarily agree to this procedure. Typically, they will also stipulate to the evidence and exhibits to be submitted to the jury, as well as to a "high-low" agreement. The high-low agreement places a ceiling and floor on the amount of the verdict, taking away the risk of either a "runaway" jury or an excessively penurious jury.

A summary jury trial takes no more than one day to hold. The judge conducts an expedited *voir dire*, the attorneys have time limits on their presentations, and the jurors are given streamlined instructions. As Judge Barry Schneider, civil presiding judge of the Maricopa County Superior Court put it, the parties to a summary jury trial "benefit significantly from having traded away all the tried and true but enormously expensive trappings of the typical jury trial."

The Seat Belt Defense

The "seat belt gag rule" is an exception to the *negligence per se* doctrine which plaintiffs' bar lobbyists have gotten inserted in many states' mandatory seat belt laws. The common law doctrine of *negligence per se* holds that a jury should consider a party's violation of a statute in determining whether he was negligent. The seat belt gag rule says

that a plaintiff's failure to comply with the seat belt law cannot be used against him, even if that non-use increased the damages he suffered. This anomaly rewards the lawbreaker and punishes the consumer. According to a University of Kentucky study, the average cost of treating a motor vehicle accident victim who was not wearing a seat belt is 4.4 times more than the cost of treating seat belt wearers.[2]

Arizona is one of the few states that does permit a seat belt defense. While it is expensive for the defense lawyer to bring in expert evidence at trial showing how failure to wear a seat belt added to a plaintiff's damages, the seat belt defense allows us to discount settlement amounts in such cases. That is only fair, since it is wrong for other insurance consumers to pay increased premiums to cover injuries that could have been mitigated if the driver acted responsibly. I would note that the Auto Choice plan actually moves away from the principle of personal responsibility-- under Auto Choice, injured drivers would be compensated without regard to whether they caused an accident by their own negligence and without regard to whether they obeyed the seat belt law.

I believe that Arizona's innovations have been successful in keeping down insurance costs. Our state constitution is unusual in that it explicitly prohibits most types of tort reform. Nevertheless, we've used procedural reforms to try to lower costs. According to a 1996 report from the Insurance Research Council, the frequency of auto personal injury claims in Arizona has dropped since 1992, when our procedural reforms began in earnest. I believe that our state's no-nonsense attitude toward wasteful and non-meritorious litigation is responsible.

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[2] Gary Flanagan, "The Seat Belt Defense: Has It Become Unbuckled?" Florida Bar Journal, January 1996.

Let me now also point to some reforms that other states have adopted to reduce tort litigation costs:

Eliminating the collateral source rule.

This old common law rule prevents jurors from hearing evidence of compensation a plaintiff receives from health insurance, wage continuation programs, or other sources. In most cases, health insurers will file a subrogation lien entitling them to reimbursement for payments from the tortfeasor. But far too frequently, in routine auto cases, health insurers neglect to file their liens. Seldom, if ever, does an employer file a lien for the plaintiff's "sick days." The result is double recoveries for many plaintiffs, and "double taxation" for the rest of us, who pay higher premiums to fund extra recoveries.

A number of states have abolished the collateral source rule. Because auto accident claims are frequently settled at an amount three times the plaintiff's economic damages, eliminating the rule may reduce payments in individual cases by as much as a third. Moreover, offsetting collateral source payments discourages the filing of some minor claims by making them economically unrewarding for plaintiffs' attorneys.

Arizona has made changes to in the collateral source rule's application to claims made for Uninsured Motorist ("UM") and Underinsured Motorist ("UIM") benefits. Insurance carriers in Arizona may now offset amounts a claimant received from workers' compensation or his auto insurance policy's Medical Payments coverage. Arizona has also eliminated "stacking" of coverage under multiple UM or UIM policies so that the claimant

receives no duplication of benefits.

"No Pay/No Play" for auto accident plaintiffs.

California has disqualified uninsured drivers from collecting non-economic damages. This measure eliminates "free riders" from the tort system-- those who sue to collect damages they incur, but don't take responsibility for paying damages they cause. According to the Insurance Commissioner in California, this has reduced costs to consumers by one quarter of a billion dollars. [3]

"Medical Injury Profiles".

Some states have experimented with practice guidelines to reduce instances of "defensive medicine:" the ordering by physicians of unneeded tests or procedures solely to avoid medical malpractice suits. These guidelines, formulated with input from medical professionals, can be introduced into evidence by doctors to contest an allegation that a certain medical treatment was necessary. We are proposing that similar guidelines be created for minor injuries from auto accidents. Such guidelines could then be introduced by defense attorneys to contest the reasonableness or necessity of medical treatment claimed by an injured party. [4] This would deter plaintiffs' lawyers from sending clients to "medical bill mills" to ratchet up damage claims.

Conclusion

I believe the need for reform in auto accident reparations is clear. But it is also clear that reforms should be targeted at alleviating the causes of *excessive* costs and claims, not at preventing the payment of *meritorious* claims. A "pure no-fault" program

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[3] J.C. Howard, "Calif. Auto Profits in High Gear," National Underwriter, April 20, 1998.
[4] See, e.g., SB 49, California Legislature, Introduced December 20, 1994 (Sen. Lockyer).

like Auto Choice might cut costs, but most of the savings its sponsors project would come from eliminating non-economic damages in *all* cases, regardless of whether the claims are inflated. No-fault may be appropriate for whiplash injuries, but it is not appropriate for serious injuries such as quadriplegia.

In contrast, the reforms outlined in my presentation are aimed at reducing the costs of litigation, or at reducing the amounts of compensation paid to claimants who either don't need it or don't deserve it. They enhance the ideal of personal responsibility that is enshrined in the tort system, rather than abrogate it.

What should Congress do, then, about excessive auto insurance costs? Certainly not throw out the tort system.

If you feel a need to take action, you could amend the federal mandatory seat belt requirement [5] to encourage states to repeal seat belt gag rules. You could provide grants to encourage more states to try the alternative dispute resolution techniques we've pioneered in Arizona.

Alternatively, you could do nothing. California adopted its no-pay no-play law by initiative, and other states may well follow suit as citizens demand action on insurance costs from their state legislators. Also, the market is encouraging practices that reduce litigation costs. Insurance companies are asking us defense lawyers to make greater use of ADR techniques and to reduce discovery costs. Frankly, sometimes we defense lawyers bristle at insurers' cost containment efforts. But we are becoming more efficient in handling claims. That is why, according to a study by the Insurance Information Institute,

[5] 23 U.S.C. 153.

only 6 cents of the insurance premium dollar goes to defense lawyers. I've appended that study to my testimony to emphasize this point, because some of the advocates of Auto Choice have been throwing around figures that are just plain inaccurate.

Applying the phrase "laboratories of democracy" to the states in our federal system may sound like a cliché, but it is proving to be accurate in the area of reducing automobile litigation costs just as it was in welfare reform. Let's not close these laboratories down with a federal Auto Choice law when they are on their way to finding solutions.

Summary of Statement of Michael R. Perry

Defense lawyers agree that states' auto accident reparations systems should be reformed, but strongly believe that the basic principles of the civil justice system are sound. Rather than imposing a federal system of no-fault auto insurance, we urge that each state be permitted to continue to experiment with methods of reducing litigation.

The following are examples of state-level initiatives that could reduce the costs of motor vehicle accident litigation:

- Discovery reform. Arizona has taken the lead in reducing the costs of discovery, which amount to about half of litigation expenses.
- Alternative dispute resolution. Arizona's ADR rules penalize parties who pursue unnecessary litigation.
- Summary jury trials. The SJT reduces the time it takes to dispose of a lawsuit.
- The seat belt defense. The seat belt defense prevents plaintiffs from recovering damages for injuries that use of a seat belt would have prevented.
- Elimination of the collateral source rule. Collateral source reform prevents claimants from obtaining double recoveries.
- "No pay/no play" for auto accident plaintiffs. A California law prohibits uninsured motorists from suing for non-economic damages.
- Medical practice guidelines. Creation of medical injury profiles would discourage plaintiffs from inflating medical bills with unnecessary treatment.

Reforms should be targeted at alleviating the causes of *excessive* costs and claims, not at preventing the payment of *meritorious* claims. The savings that Auto Choice sponsors project would come from eliminating non-economic damages in *all* cases, regardless of whether the claims are inflated. No-fault may be appropriate for whiplash injuries, but it is not appropriate for serious injuries such as quadriplegia.